Filed 6/10/19 P. v. Tambert CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANDREW RYAN TAMBERT,<br><br>Defendant and Appellant. | C085731<br><br>(Super. Ct. No. 62150726B) |

A jury found defendant Andrew Ryan Tambert guilty of taking or driving a water truck, a flatbed truck, and an excavator; grand theft of a welder; and felony and misdemeanor vandalism of the two locations at which these vehicles and welder had been located. It sustained allegations that he had been free pending trial in two Sacramento County cases at the time of each incident, two allegations of excessive loss (above both $100,000 & $200,000) in connection with the excavator, and recidivist allegations. The jury acquitted him of charges involving a travel trailer, often called a "fifth-wheeler." The trial court sentenced him to a split term of local prison followed by supervised

release (the pertinent details of which we will include in the Discussion); it imposed a concurrent 180-day term for the misdemeanor vandalism count.

On appeal, defendant challenges evidence resulting from a search of his truck and cell phone, the admission of evidence of an uncharged 2015 crime involving the theft of construction equipment, the admission at trial of two text messages on his phone as nonhearsay, and the use of the pattern jury instruction on adoptive admissions with respect to these text messages. In addition, defendant raises the spectre of the cumulative effect of these errors. He also contends we should strike the enhancement for an excessive loss exceeding $200,000 that expired under its own terms after his trial and impose the lesser enhancement,[1] and should strike two of the four on-bail enhancements, a point the People concede. Except for the latter point, we reject these arguments and will affirm the judgment as modified.

## FACTUAL AND PROCEDURAL BACKGROUND

The contentions on appeal do not involve sufficiency of the evidence. As a result, our evidentiary recount is limited primarily to providing context.

In January 2017, the project manager at a Roseville construction site arrived at work and found a Caterpillar excavator had been moved from its parking space on the road and was now buried in the mud in the middle of the site with a broken windshield (resulting in costs to the site owner to abate mud pollution), along with a Kubota recreational vehicle. He called the police. There was a photograph of the excavator on

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[1] At oral argument, defendant first raised the issue of a full consecutive two-year sentence for this enhancement, appearing in the abstract of judgment, rather than impose only one-third of the enhancement to the subordinate count five to which it applies. (Pen. Code, § 1170.1, subd. (a).) While we ordinarily would not entertain an issue raised in this belated manner, the People did not have any objection to our consideration of the claim. We will therefore direct the trial court to modify the abstract of judgment in this respect.

defendant's cell phone that he had sent to recipients with the message "[m]y mess." The next day, the project manager received a call telling him that there was now a Toyota 4Runner stuck in the mud and people had been seen on the construction equipment. The Caterpillar excavator had been moved again, and two other pieces of equipment were damaged in efforts to get them to start.

The police responded. The stranded 4Runner was registered to Dale Chapman (a codefendant), whom the police contacted.[2] The investigation led to defendant, whom they called. He acknowledged having gone to the site to try to help Chapman extract the 4Runner from the mud and pick up Chapman and a passenger. He denied making any use of construction equipment.

A few days later, a business in an industrial yard in Rocklin reported a burglary. The equipment manager had responded to alarm notifications, arriving early in the morning. A welder and a water truck were missing, and an F-450 truck had been moved. There were damages to the truck, four other work trucks, and the premises. Surveillance video showed a man dismantling the security gates and driving off in a flatbed truck pulling the welder trailer. The man returned a few hours later and drove off in the water truck. In the early morning, the man returned the flatbed truck. The man was wearing dark pants, an orange hooded sweatshirt, and a black jacket.

A stolen fifth-wheeler had been parked in the lot next to the Rocklin industrial yard since late December 2016, along with a white pickup truck, later identified as the property of defendant, and a light-colored sedan. A detective, alerted to the presence of the fifth-wheeler, determined that it was stolen. Inside were papers bearing defendant's name, along with an orange hooded sweatshirt and black jacket. Police retrieved a picture of the fifth-wheeler attached to the pickup truck belonging to defendant.

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[2] The parties do not discuss the disposition of the codefendant's case.

In the opinion of an investigating detective, the body type of the person in the surveillance video was consistent with defendant. When the detective told this to defendant, along with noting the similarity of the clothing in the video to the clothes retrieved from the fifth-wheeler, and the car seen in the video to be defendant's, defendant then admitted taking and selling the welder and secreting the water truck.

## DISCUSSION

### 1.0 Defendant Fails to Establish an Illegal Search of his Truck or his Cell Phone

In the facts adduced from police witnesses in the hearing on defendant's motion to suppress evidence found in the course of a search of his truck and his cell phone, his contest to the search of the fifth-wheeler abandoned on appeal, the police contacted him at a Sacramento motel as he was walking toward his truck in the parking lot. Police had already identified defendant as a suspect in the present offenses, and had searched the abandoned fifth-wheeler, finding evidence of the other offenses. Stopping him just outside his truck, the police placed him in handcuffs and asked for consent to an overall search of the truck; defendant assented. The search of the cab found work boots and Caterpillar keys.

Police questioned defendant at the station. In the course of the interview, they asked for permission to search his cell phone, to which defendant consented. While his girlfriend had previously provided it to them, the police asked defendant for the password for the phone to conduct the search. He did not revoke his consent at any point during the search of the phone's contents. They copied the contents to an external device.

In testimony at the hearing, defendant contended he had authorized a search only of the bed of his truck, not the cab. Defendant also claimed that the police had begun starting to scroll though the phone before asking for permission, and that he had protested the search.

The trial court found defendant consented to the search of the phone, which it concluded was voluntary under the circumstances. It upheld the search of the truck as being incident to an arrest.

Defendant asserts the search of his truck cannot be justified as a search incident to arrest, and further claims (in one-paragraph "arguments" in his opening & reply briefs) that "credible evidence of consent" was absent. We do not need to reach the former point, because there is substantial evidence of consent to the search. Defendant disregards the standard of substantial evidence we apply to the factual bases for a trial court's rulings on questions of law, adverting to other evidence that would contradict the trial court's factual findings. The police had testified that defendant consented to a search of his entire truck. That is the beginning and the end for a reviewing court.

The same is true with respect to the search of the contents of the cell phone. To the extent there is *conflicting* evidence on the issue, *it is irrelevant* in light of substantial evidence in support of the ruling. That defendant might rely on the video recording of the interview to further his meritless claim does not change our standard of review. We do not review the video de novo, nor does video evidence trump testimony as a matter of law. The trial court was privy to the testimony of the officers, defendant, and the video in concluding that defendant had consented to the search of the contents of the phone, implicitly rejecting the assertion in defendant's testimony that the officer already had a search in process when he asked for consent without ever asking for a password, or his assertion on appeal that the video contradicts the officer's testimony. Defendant therefore utterly fails to establish that this ruling was erroneous as a matter of law. As for his claim that the search exceeded his consent because the police made a wholesale copy of the phone's contents to an external device, he does not tie this assertion to any particular prejudice beyond the evidence actually admitted from the phone, which we analyze subsequently. We therefore reject this argument as well.

## 2.0 Evidence of the 2015 Incident was Ultimately Harmless

When called to the stand defendant first engaged in an elaborate ritual of prayer, which he concluded with the Catholic gesture of the sign of the cross. In the course of his testimony, when the trial court inquired about a document defendant appeared to be consulting, defendant responded that it was a psalm. At this point, the trial court excused the jury. The court expressed its opinion that defendant, through his conduct, had injected evidence of his good character into the proceedings. The court remarked that the present trial was not defendant's "first rodeo"; defendant was aware of the rules, and the court was not going to tolerate games in which defendant created "an aura in front of this jury without consequences."

On the following day, the prosecutor notified the court during instruction-setting that it had apparently *just* tracked down a 2015 incident involving stolen construction equipment traced to defendant's residence; when officers arrived, defendant concealed himself under the house after setting off irritating vapors from pepper spray and bleach, and beat the head of a police dog that located him. "[S]ince the defendant prayed before he started, made the sign of the cross . . . , told[] all of them he was reading from a psalm, [the People] believe the defendant's character is in issue" and this uncharged incident "directly relates specifically to the defendant's character." Defense counsel asked simply for an admonition to disregard defendant's conduct. In ruling on the motion, the trial court also noted that defendant's testimony *otherwise* made "it sound as though he was ready for the father-of-the-year award" with respect to his background other than the demonstrations of his piousness. It thus concluded this prior incident would counter this evidence of good character. It further found that this evidence was also relevant to issues of motive, opportunity, intent, preparation, planning, knowledge, "even" identity, and absence of mistake (although the court was not entirely convinced the higher standard for

proof of identity was satisfied). (Evid. Code, § 1101.) It found the probative value was high in comparison with any prejudicial effect.[3] (*Id*., § 352.)

Accordingly, in rebuttal the prosecution called a witness to testify to the facts underlying the 2015 incident. A tracking device led police to three stolen vehicles (two construction equipment items & a trailer) at defendant's residence. When the officers attempted to execute on a search warrant, the occupants resisted entry. After battering down the door, the officers encountered the presence of corrosive vapors (bleach & pepper spray) on entry. Unable to find defendant, the officers used a police dog to locate him, who found him underneath the house. Defendant told his girlfriend in a later phone conversation that when the dog seized his arm, he began to beat it over the head with a rock in an effort to get the dog to let go. The witness did not testify that this incident resulted in any charges or convictions.

We will not belabor the criteria for admission of this previous incident pursuant to Evidence Code section 1101. The evidence otherwise supporting defendant's convictions is not remotely equivocal such that the admission of the 2015 incident could have had any incremental effect. Defendant shared a picture of the mired Caterpillar with the caption that this was his fault, he also admitted being at the same construction site the following day, and he admitted to the police his theft of the water truck and welder, which video showed was transported with the flatbed truck. His testimony attempting to account for all this was simply rejected. We do not find the rejection of his account to be the result of any prejudice from the 2015 incident, because the jury still gave him the

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[3] Both parties focus on this latter basis for admitting the evidence. They do not address the alternative aspect of the trial court's ruling—defendant's conduct at trial warranted evidence contrary to his effort at portraying himself as a person of piety. We presume this is a function of the principle that *specific acts* of a defendant's bad character are inadmissible to rebut evidence of good character. (*People v. Felix* (1999) 70 Cal.App.4th 426, 432.) We thus do not consider the character aspect of the ruling further.

benefit of the doubt with respect to the charges related to the stolen fifth-wheeler. As a result, we reject this argument.

### 3.0 Admission of Text Messages was Harmless

The "excessive" copying of the contents of the cell phone (see *ante*) resulted only in the prosecution seeking to admit a text "stream" from the codefendant and one text from defendant's girlfriend.[4] The stream of texts from the codefendant stated, "The steering and alignment is fucked off. Also, you should get your facts straight before you go and say things that aren't true. The cops already had you in your truck on film when I talked to them. I don't need to tell you -- tell them who you were. I don't want nothing to do with you and your bullshit. Look man, I don't owe you shit. The only reason I am in this tucked up mess in the first place is because I was out there to help you, which you showed 0 appreciation for as a matter of fact you pretty much treated me like a" (the prosecutor declining to repeat an expletive) "since then. It cost me 2 grand to get my car back on top of" (at which point the string breaks off). The text from defendant's girlfriend stated, "U left us with money in a stolen RV u motherfucker. U motherfucker I thought U were here. I needed hot -- hot water, IM so fucking pissed. What a piece of shit U are. OMG IM calling Trish to pick up Logan. Your all bad. I'm flipping the fuck out how the fuck could u do this u asshole." (Capitalization omitted.) The external device showed both messages had been read by someone with access to the phone. There was not a response to either text.

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[4] Although the parties transferred *other* exhibits to this court, they did not include the actual exhibits themselves with respect to these text messages. They both instead rely on the prosecutor's recitation of the contents of the exhibits when he sought admission of this evidence, which we accordingly credit. (*Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 175, fn. 3.)

Defense counsel asserted that the texts were hearsay and in any event were prejudicial in light of the language employed. The prosecutor asserted these texts were admissible as nonhearsay circumstantial evidence of a crime. The trial court, relying on the decision of this court in *People v. Morgan* (2005) 125 Cal.App.4th 935, 945-946 (*Morgan*), rejected the nonhearsay theory but concluded the factual assertions contained in the texts were admissible pursuant to *Morgan*'s theory of a nonstatutory *hearsay exception* for reliable implied assertions of conduct on the part of the declarant (in *Morgan*, the expressed desire over the phone to purchase controlled substances). The court also suggested that hearsay exceptions for statements of a co-conspirator or adoptive admissions applied.

In discussing instructions, defendant argued that it was not proper to instruct on adoptive admissions as a hearsay exception with respect to these texts because they were not communicated directly to him under circumstances where he would be expected to deny any implied complicity in illicit conduct to any witnesses to the circumstance of the message, to give this argument more thorough explanation than raised here or below. The trial court, however, was of the belief that if one received a text message with which one disagreed, there would be a "heightened sense" of a need to respond, and thus the principle of adoptive admissions applied.

We accept arguendo defendant's separate contention that the trial court erred in admitting the substance of these texts as a nonstatutory hearsay exception pursuant to *Morgan* (a dubious theory in this context in any event, although it is the focus of the People's opposition brief), because it is subsumed within his challenge to the instruction on the substantive use of this text evidence under the hearsay exception for adoptive admissions. As to the latter, we find any error harmless.

The admission of these texts and the instruction allowing the use of their contents as proof of the matters asserted therein is patently harmless beyond a reasonable doubt.

As we have just stated in the prior section, the evidence at trial that supported his convictions was not remotely subject to reasonable dispute, and in addition the finger-pointing in these texts is merely cumulative from involved people with axes to grind. Nor is this evidence otherwise inflammatory regardless of the vulgarity therein (again, given that the jury did not convict him of any charges relating to the stolen fifth-wheeler). Moreover, we do not believe reasonable jurors, as instructed, would find that defendant "would under all the circumstances naturally have denied the statement" in a responding text rather than just roll his eyes and scroll on to the next text in an attitude of "whatever . . . ." We therefore reject this argument.

**4.0 Cumulative Error is Absent**

We did not find any error in section 1.0, and found any possible error in sections 2.0 and 3.0 to be harmless in light of the unequivocal evidence of defendant's guilt. Even if we take both the 2015 incident and the text messages together as erroneously admitted evidence, this does not change our conclusion. We thus reject the claim of cumulative error.

**5.0 The Expiration of an Enhancement Does not Benefit Defendant**

Pursuant to Penal Code section 12022.6, if a defendant takes, damages, or destroys any property in the commission of a felony resulting in a loss to the victim in excess of $200,000, the trial court is to impose an enhancement of two years. (*Id.*, subd. (a)(2).) However, "the provisions of this section [are to] be reviewed within 10 years to consider the effects of inflation on the [various enhancements] imposed. For that reason this section shall remain in effect only until January 1, 2018, and as of that date is repealed unless a later . . . statute . . . enacted before [that date], deletes or extends that date." (§ 12022.6, subd. (f).)

The trial court sentenced defendant in September 2017 pursuant to this greater enhancement. (The disposition of the lesser alternative loss enhancement is not apparent in the record, nor do the parties discuss it.) He argues the subsequent expiration of the statute entitles him to dismissal of this enhancement, analogizing to the principle under *In re Estrada* (1965) 63 Cal.2d 740 under which we presume the Legislature intended any mitigations in statutory punishment to apply retroactively to all sentences not yet final; a principle invoked with frequency in the recent decade of sentencing reform.

As the People properly point out, *In re Pedro T.* (1994) 8 Cal.4th 1041 (*Pedro T.*) rejects the application of this principle to the expiration of a statute under its own terms, a so-called "sunset" clause. Defendant does not address *Pedro T.* in his opening brief, and references *People v. Nasalga* (1996) 12 Cal.4th 784 (*Nasalga*) only with a "see" cite in the last line of his argument in support of the point that no remand is necessary to dismiss the enhancement. In his reply brief, defendant *first* argues that *Nasalga* limits the reach of *Pedro T.*

*Pedro T.* involved a three-year increase in the maximum punishment for taking or driving a vehicle without authorization that expired of its own terms unless extended. The Legislature did not act before January 1993, and the lesser punishment was reinstated as of that date. (*Pedro T, supra*, 8 Cal.4th at p. 1043.) The minor, apparently sentenced at some point in 1992, claimed entitlement to the mitigated punishment during his pending appeal. (*Id*. at pp. 1044, 1046-1047.) *Pedro T.* noted that the question was one ultimately of legislative intent; while it is easy to draw an inference that *affirmatively* acting to reduce an existing punishment reflects a determination that the lesser punishment is sufficient to serve the public interest, "the same inference cannot so readily be drawn" from the *automatic expiration* of a temporary increase. (*Id*. at p. 1045.) "Far from determining that a lesser punishment . . . would serve the public interest, the Legislature expressly declared that *increased* penalties were necessary" (*id*. at p. 1046);

an "experiment in harsher penalties in no way signifies a determination that [a crime] is less blameworthy than previously thought" (*id*. at p. 1047). Moreover, giving a sunset date this ameliorative effect would have the result of indeterminately abbreviating the operative period of the statute and providing motive "for delay and manipulation in criminal proceedings" to gain the benefit of the expiration. (*Id*. at pp. 1046-1047.)

Assuming defendant has not forfeited any invocation of the substantive portion of *Nasalga* beyond his original cited point (*Sourcecorp, Inc. v. Shill* (2012) 206 Cal.App.4th 1054, 1061, fn. 7), it is not apposite. It involves an *ongoing* increase in the threshold amount for the two-year loss enhancement under an earlier version of the statute at issue in the present case (also then expressly subject to legislative revisiting), which as a result exempted a larger class of defendants from its reach and left them subject only to a one-year enhancement. The defendant, whose conviction was not final before the effective date of this increase in the threshold, claimed the benefit of this reduced punishment for the amount of loss his crime generated. "[C]ourts have held that amendments, such as the one at issue here, that mitigate punishment by increasing the dollar amount for certain . . . enhancements, should be applied retroactively, in the absence of a saving clause or other indicia of a contrary legislative intent." (*Nasalga, supra*, 12 Cal.4th at pp. 787, 793.) The distinction drawn from *Pedro T.* lay *not* in the presence of a sunset clause and an ongoing legislative concern about adjusting the enhancement for the effects of inflation, but from an absence of any indicium of intent to punish defendants *more* harshly, as in *Pedro T.* (*Nasalga*, at p. 795.) Similarly, in the present case, legislative *inaction* in the face of the sunset clause on a temporary enhanced punishment—always a weak reed on which to lean (*Troy Gold Industries, Ltd. v. Occupational Safety & Health Appeals Bd.* (1986) 187 Cal.App.3d 379, 391, fn. 6)—does not give rise to an inference of an intent of legislative lenience. We thus reject the argument.

## 6.0 The Trial Court Erred in Imposing Too Many On-Bail Enhancements

Based on the two independent outstanding Sacramento prosecutions for which defendant was on bail at the time of the present offenses, the jury sustained enhancements for both pending cases in *both* sets of the present criminal offenses at the two locations, and the trial court accordingly imposed *four* additional sentence enhancements (albeit stayed until the resolution of the Sacramento prosecutions). As the People properly concede in response to defendant's challenge, these enhancements are *offender*-related and not *offense*-related, and therefore defendant is subject only to two enhancements for being on bail at the time of all of the offenses at bar.

Enhancements attach either to the nature of the crime, or to the offender. (*People v. Coronado* (1995) 12 Cal.4th 145, 156.) Enhancements for the commission of a crime while on bail for a particular case is among the latter, and a court can impose it only once in sentencing a defendant on multiple offenses in a subsequent prosecution. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 377.) Thus, as defendant correctly maintains, he is subject only to two stayed enhancements in the present case based on the two cases from Sacramento on which he had been released on bail before the present series of crimes. We shall therefore strike two of the stayed on-bail enhancements.

## DISPOSITION

We strike two of the enhancements for committing counts five and six while on bail for the Sacramento County prosecutions. We also modify the loss enhancement on count five to an eight-month sentence. As thus modified, we affirm the judgment. The trial court shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

s/BUTZ, Acting P. J.

We concur:

s/MURRAY, J.

s/HOCH, J.